

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ANTONIO TRAVIS STEWARD,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11951
Trial Court No. 3AN-12-8677 CR

MEMORANDUM OPINION

No. 6341 — June 1, 2016

Appeal from the Superior Court, Third Judicial District,
Anchorage, Michael L. Wolverton, Judge.

Appearances: Glenda Kerry, Law Office of Glenda J. Kerry,
Girdwood, for the Appellant. A. James Klugman, Assistant
District Attorney, Anchorage, and Craig W. Richards, Attorney
General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock,
Superior Court Judge.*

Judge SUDDOCK.

Antonio Travis Steward was indicted and tried for second-degree theft by receiving a stolen access device (a stolen check) and for second-degree forgery. The jury convicted Steward of theft but acquitted him of forgery.

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

On appeal, Steward argues that the jury’s verdicts were inconsistent and that the judge committed plain error by not recognizing this. But Steward’s attorney failed to object to the verdicts before the jury was discharged, and this constitutes a waiver of Steward’s claim.¹

Background facts and proceedings

In late July 2012 an employee of a wholesale supply company in Anchorage stole three blank checks from her employer. Then, on a Sunday (when the business was closed) Antonio Steward attempted to negotiate one of the stolen checks at a check-cashing store. The handwritten check, made out to Steward in the amount of \$801.69, was purportedly for “labor.”

Scarcely two hours earlier, the check-cashing store’s clerk had refused to cash another of the stolen checks presented by the husband of the employee who stole them. Although the name of the signer was the same on both checks, the handwriting was different, and the earlier-dated check bore a later check sequencing number. Accordingly, the clerk refused to cash Steward’s check. The following day, she called the wholesale supply company’s owner, who reported the theft of the checks to the police.

Steward was indicted for second-degree theft (theft of an access device) and second-degree forgery.² The State’s theory at trial was not that Steward had actually stolen the check, but rather that Steward received it as stolen property and then attempted to cash it.

¹ See *Miller v. State*, 312 P.3d 1112, 1115 (Alaska App. 2013).

² AS 11.46.130(a)(7) and AS 11.46.505(a)(1), respectively.

The jury heard the taped statement of the wholesale supply company employee confessing that she stole the checks but denying that she knew Steward. Later, Steward's ex-girlfriend testified that her brother had asked her to cash a check for work he had done for the wholesale supply company. The brother, she testified, had told her that he could not cash the check himself because he did not have a bank account or identification. Since she had lost her own ID card, she asked her boyfriend Steward to cash the check, as a favor.

The State argued in closing that Steward recklessly disregarded an obvious risk that the check was stolen, and that he attempted to cash a check he knew was forged. Steward did not contest that the check was stolen by the wholesale supply store employee or that it was forged by someone. Rather, Steward's defense was that he "played the fool" while his girlfriend and her brother duped him into unwittingly agreeing to cash a forged check. Steward, argued his attorney, lacked the mens rea to commit theft or forgery.

The jury acquitted Steward of second-degree forgery but found him guilty of second-degree theft by receiving. At Steward's request, the court polled the jury and confirmed that the verdicts were unanimous. But Steward did not object to the verdicts as inconsistent. This appeal followed.

Why we find no plain error

When a defendant at trial fails to properly preserve a claim of error for appeal, this Court reviews the claim under a plain error standard. Under our test for plain error, the appellant must show that the error "(1) was not the result of intelligent waiver

or a tactical decision not to object; (2) was obvious; (3) affected substantial rights; and (4) was prejudicial.”³

Under our holding in *Miller v. State*, a failure to object to purportedly inconsistent verdicts before the jury is discharged precludes a finding of plain error.⁴ This is because a defendant will always have a powerful incentive to withhold objection. If the defense objects, the judge may resubmit the matter to the jury, and the defendant then risks conviction on both charges. But by withholding objection and consenting to discharge of the jury, the defendant locks in the not-guilty verdict on one of the charges; principles of double jeopardy will preclude a retrial. And if an appellate court finds the verdicts to be inconsistent, the appellant is then entitled to a new trial on the remaining count. Accordingly, Steward’s failure to object to the purported inconsistency of the verdicts means that he has waived his claim.

Even if we were to reach the merits of Steward’s claim, Steward has failed to show that the jury’s verdicts are logically inconsistent.

To convict Steward of second-degree theft, the State had to prove that he acted with reckless disregard that the property might have been stolen⁵ — *i.e.*, that he was aware of and consciously disregarded a substantial and unjustifiable risk that the check was stolen.⁶ In contrast, to convict Steward of the forgery charge, the State had to prove an entirely different mens rea — that Steward *actually knew* that the check was forged.⁷ Given the evidence in this case, the jury might reasonably have concluded that

³ *Adams v. State*, 261 P.3d 758, 764 (Alaska 2011).

⁴ *Miller*, 312 P.3d at 1115.

⁵ AS 11.46.190.

⁶ *See* AS 11.81.900(a)(3).

⁷ *See* AS 11.46.505.

Steward was *reckless* as to whether the check was stolen but that the State failed to prove beyond a reasonable doubt that Steward *knew* the check was forged.

Accordingly, the two verdicts are not logically inconsistent, and Steward's claim of error would fail even were it not foreclosed by his failure to object to the verdicts in the trial court.⁸

Conclusion

We AFFIRM the judgment of the superior court.

⁸ See *Brown v. Anchorage*, 915 P.2d 654, 660 (Alaska App. 1996).